

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges accidental injury on October 10, 1997, and each and every day thereafter through his termination of employment with respondent on November 26, 1997. Claimant has alleged injury to his neck and back. Claimant testified that on October 10, 1997, he began experiencing problems in his back and neck while using a forming machine to perform work on a job identified as parts numbered 345 and 346. Claimant testified that he advised his immediate supervisor, Mr. Ed Waluk, about the problem and was replaced for the remainder of that day with a co-worker named Chithach.

However, the evidence in the record conflicts with claimant's testimony. First, the records provided by Mr. Julian Guerra, II, the Manufacturing Operations Manager, indicated that Mr. Chithach did not work on October 10, 1997, so he could not have replaced claimant on that job. This information was verified by Mr. Ed Waluk, the supervisor of the brake and hand form area. In addition, the records indicated claimant at no time during the month of October worked jobs 345 and 346. Again, this information was verified by both Mr. Guerra and Mr. Waluk. Mr. Guerra and Mr. Waluk also testified that claimant failed to advise them at any time of a work-related accident. Amy Guerra, respondent's Human Resources Manager and keeper of the records, was never advised of a work-related accident even though she was in charge of creating and maintaining accident reports.

Respondent's witnesses did discuss the fact that claimant was having health difficulties in November 1997 and, in particular, suspected he was suffering from colon cancer. Claimant's termination of employment in November 1997 was so that he could move to Oklahoma to be near his family.

The Administrative Law Judge found that claimant failed to prove accidental injury arising out of and in the course of his employment as there had been no aggravation of a preexisting condition which would entitle claimant to workers compensation benefits.

The potential for an aggravation of a preexisting condition arises because claimant had a previous workers compensation claim involving his neck and his upper back which was settled on May 19, 1994. This was a full and complete settlement of all issues including claimant's entitlement to future medical treatment.

It is significant that claimant failed to seek medical treatment at any time during October or November 1997 for his neck or back. He was, however, being treated for possible cancer, although the diagnosis did ultimately prove to be inaccurate.

In workers compensation litigation, it is the claimant's burden to prove by a preponderance of the credible evidence his entitlement to the benefits claimed. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g). In this instance the Appeals Board, after considering the evidence, finds claimant has failed to prove accidental injury arising out of and in the course of his employment as the testimony of respondent's witnesses, coupled with the respondent's documentation, prove claimant could not have worked the

jobs alleged. This finding renders the Appeals Board's consideration of the issue of notice and the issue of the nature and extent of claimant's injury or disability moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated April 15, 1998, denying claimant benefits for having failed to prove accidental injury arising out of and in the course of his employment should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Robert G. Martin, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director